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SUPREME COURT
STATE OF WASHINGTON

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NO. 79883-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

Joan Marie Griffith,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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FILED AS ATTACHMENT
TO E-MAIL

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A. ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in ordering Petitioner to pay more restitution than was proven.

Issue Pertaining to Assignment of Error

Petitioner was convicted of possession of stolen property. Did the trial court err in ordering restitution for property it was not shown that Appellant had possessed?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Essentially the facts as to what Ms. Griffith possessed were that Mr. Slaughter at the coin store saw her with 1) gold scrap that he purchased for \$96, RP 8-10, 2) a string of pearls that he purchased and which were returned to the victim, *Id.*, RP 7, 3) a diamond ring that he could not describe in more detail but which was "similar" to the victim's, RP 10, 14, which his father, the co-owner of the store, apparently valued at around \$500, CP 30, and 4) other items in a

plastic bag that he could not describe. RP 9-10, 15.

The facts as to value were that Mr. Linscott said that if you took "the record" she had been given which "we punched into the police report" then the value was over \$11,000. RP 7. Ex. P1 was a list of values of items by general groups.

C. ARGUMENT

The State may point to case law indicating an abuse of discretion standard of review for restitution decisions. But it is more refined than that. The Court of Appeals in *State v. Kinneman*, 122 Wn. App. 850, 95 P.3d 1277 (2004), concluded that "[u]nlike a standard range sentence, restitution is not entitled to a presumption that there can be no abuse of discretion as a matter of law." *Id.* at 859. On review, the State Supreme Court agreed. *State v. Kinneman*, 155 Wn.2d 272, 284, 119 P.3d 350, 356 (2005). A trial court's authority to impose restitution is derived from statute. *State v. Hiett*, 154 Wn.2d 560, 563, 115 P.3d 274, 276 (2005). Here, the relevant statutes provide:

(38) "Restitution" means a specific sum of money

ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

RCW 9.94A.030

(7) The court shall order restitution as provided in RCW 9.94A.750 and 9.94A.753.

RCW 9.94A.505

(3) Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on ***easily ascertainable damages*** for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

...

(5) Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property or as provided in subsection (6) of this section unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment and the court sets forth such circumstances in the record. In addition, restitution shall be ordered to pay for an injury, loss, or damage if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's

recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement. RCW 9.94A.753 (emphasis added)

The statute precludes restitution for speculative and intangible

losses. *Kinneman*, 155 Wn.2d at 285. "Evidence supporting restitution is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture." *Id.* (quoting *State v. Fleming*, 75 Wn. App. 270, 274-75 877 P.2d 243 (1994)). If the defendant disputes facts relevant to determining restitution, the State must prove the damages at an evidentiary hearing by a preponderance of the evidence. *Id.*

The Court of Appeals opinion in this case cites with approval to *State v. Hiatt* 154 Wn.2d 560, 564, 115 P.3d 274 (2005). That was a case in which juveniles convicted of taking a motor vehicle without permission argued they were not responsible for damage done when other co-defendants originally took the vehicle, which they rode in later during the conduct. But *Hiatt* was a case in which all the defendants

were convicted of the same crime, and the Court held “ all defendants are jointly and severally responsible for the restitution. RCW 13.40.190(1).” Id.

RCW 13.40.190(1), applicable to the juvenile offenses in *Hiatt*, provides in part that “If the respondent participated in the crime with another person or other persons, all such participants shall be jointly and severally responsible for the payment of restitution.” That reasoning does not apply here, as Petitioner was not convicted of the same crime as whoever committed the burglary of the victim’s home and the theft of all the missing items. So principles of joint and several responsibility do not solve the issue here, assuming they apply to adult offenses. To the extent that the Court of Appeals extended the *Hiatt* reasoning to the situation here, where possession of stolen property obviously must be preceded by a theft, the logic does not apply, where there is no evidence Ms. Griffith took part in anything other than the unlawful possession of the items in her own actual possession. The real problem here, that the evidence was at best speculative as to specific items

possessed by Ms. Griffith beyond what was sold to the coin shop, is not solved by application of *Hiett*.

Apart from the test for the causal link between the crime and the losses, even if this case depends solely on whether the findings are sustained by a preponderance of the evidence, then the finding of \$11,500 due to the victim from Ms. Griffith cannot be sustained.

The trial court's finding that "... \$11,500 of Elaine Linscott's property was identified by John Slaughter as having been in defendant possession after the crime," CP 25-26, is simply not supported by substantial evidence. John Slaughter described only \$96 in scrap gold, the pearls that were recovered, the diamond ring that he could not describe in any detail, and a bag of items he could not describe. Yet the Court of Appeals says that he "remembered other items," citing to RP 9-10, 15. Other than the specified items, he was able to say only that Ms. Griffith had a "bag of stuff," RP 9, a "mixture of stuff," RP 10, "a big bag of jewelry. All different sets." RP 15.

That does not constitute proof by any standard or of the

“easily ascertainable damages” required by RCW

9.94A.753(3).

There is no way that a fair minded trier of fact could say that more probably than not, the “bag of jewelry,” without additional information, must have been taken from Ms. Linscott. The Superior Court made a restitution award based on the “speculative” basis forbidden by the test laid down by the Supreme Court of Washington. *Kinneman*, 155 Wn.2d at 285. Because the trial court applied an incorrect legal analysis, it abused its discretion. *Id.*, at 289.

In *Kinneman*, the Supreme Court of Washington held that the Court of Appeals properly remanded the case for an evidentiary hearing on Rodney Brown's losses, where the trial court had ordered restitution to Brown for amounts Kinneman had stolen from funds held in escrow for a real estate sale, without a showing those amounts represented losses to Brown, the property buyer, as opposed to the lender. *Kinneman*, at 290.

In this case, there already had been an evidentiary hearing, and there is no reason to believe any other evidence is

available other than the speculation presented at the
restitution hearing. Therefore, there should be no new
hearing, only reversal and vacation of the erroneous restitution
order.

D. CONCLUSION

This Court should reverse the Court of Appeals' Published
Opinion and the Superior Court's Order of Restitution, and
direct that the Superior Court enter an Order that no
restitution is owed.

Respectfully

submitted,

May 1st, 2008

Edelblute

Petitioner

13808

/s/William Edelblute,

William
Attorney for
WSBA

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Certificate of Mailing

I hereby certify that on the 1st day day of
May, 2008, I mailed true and accurate
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